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Clerk

Supreme Court of the United States

No. 609

THE EMPLOYERS LIABILITY ASSURANCE CORPORATION, LTD.,

Petitioner

versus

P. J. DONOVAN, Deputy Commissioner for the Seventh Compensation District of the Bureau of Employees' Compensation, United States Department of Labor, and LOUIS BILLODOUX,

Respondents

PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner seeks certiorari to review a judgment of the Court of Appeals for the Fifth Circuit

Opinions Below and Jurisdiction

The District Court rendered no written opinion. The opinion of the Court of Appeals has not yet been reported and is printed in the appendix hereto together with the opinions of the same court in the companion case of *Atlantic & Gulf Stevedores, Inc. vs Cook.*

The judgment of the Court of Appeals is dated and was entered May 27, 1960. The jurisdiction of this Court is invoked under 28 USC 1254.

Question Presented

May the Deputy Commissioner actually administering a matter under the Longshoremen's and Harbor Workers' Compensation Act refuse an insurance carrier's request for a hearing to try issues, including the status of the employee, especially when the employee, having accepted substantial benefits under the Longshoremen's Act, is also suing for damages under the Jones Act, for maritime and tort damages, for maintenance and cure benefits, and for state workmen's compensation benefits?

This question has been decided differently by two panels of the Court of Appeals for the Fifth Circuit. Direct intra-court conflict was averted by a special *per curiam* opinion on petition for rehearing, narrowly limiting the original decision in the companion case. The judge who wrote the original opinion in that case dissented from the *per curiam* opinion. The Deputy Commissioner has obtained suspension of mandate in the companion case pending a decision by the Department of Justice whether it will petition for certiorari.

Statutory Provisions Involved

This case involves the construction and application of Sections 14(h) and 19(c) of the Longshoremen's and Harbor Workers' Act (33 USC 914(h) and 919(c)) and

Section 6(a) of the Administrative Procedure Act (5 USC 1005(a)). The Sections are set forth in the appendix hereto at pages 12 and 13 below.

Statement of the Case*

Petitioner seeks a mandatory injunction ordering the respondent Deputy Commissioner to call a hearing to determine, among other things, the issue of coverage under the Longshoremen's Act.

Respondent Billodoux, an iron worker on a drilling platform nine miles off the coast of Louisiana hurt his arm May 22, 1957. R.3. The accident was reported to the Deputy Commissioner's office the day after it occurred. He accepted the case and processed it under Claim No. OCS 866-17 and proceeded to administer it under the Outer Continental Shelf Act (43 USC 1333(e).) R.3,4

For fifty-three weeks Billodoux accepted payments of $53 a week under the Longshoremen's Act. R.3. Compliance with that act was carefully supervised by the Deputy Commissioner who was in communication with Billodoux and his attorney. R.3,4.

At the end of fifty-three weeks Billodoux went back to work and the Deputy Commissioner scheduled a conference to determine if further payments might be due, sending notices to Billodoux's attorneys and petitioner. R.4. The Deputy Commissioner cancelled the

*Most of the facts recited appear in the complaint.

conference as soon as he heard that Billodoux had filed two suits in the United States District Court against his erstwhile employer, demanding damages for maritime tort, damages under the Jones Act, maintenance and cure benefits, and, alternatively, Louisiana workmen's compensation benefits. R.4,5.

Then petitioner, as insurer of the employer's liability to its employees, formally requested the Deputy Commissioner to fix a hearing to determine (1) whether the Deputy Commissioner had jurisdiction of Billodoux's claim under the Longshoremen's Act; (2) if the Deputy Commissioner had jurisdiction, whether Williams-McWilliams, the employer, and the carrier owed any further compensation payments to Billodoux under the Longshoremen's Act; and (3) the amount, if any, remaining due under that act. R.5.

Petitioner's request was denied and this suit was brought in the United States District Court. R.5. Federal jurisdiction was invoked on the basis of diversity of citizenship, and of the federal questions involved arising under the Longshoremen's Act, the Outer Continental Shelf Act and the Administrative Procedure Act. R.2,3. The Deputy Commissioner dismissed the case on respondent's preliminary motion without finding of fact, or assignment of reasons, and petitioner appealed to the Court of Appeals for the Fifth Circuit. R.71,72.

Meanwhile, the same district court had also dismissed a complaint for the same type of relief in a companion

case, *Atlantic & Gulf Stevedores vs Donovan*, and the plaintiff in that case had also appealed.

The appeal in *Atlantic & Gulf Stevedores vs Donovan* was heard and decided first. On January 18, 1960, the judgment of dismissal in the *Atlantic & Gulf* case was reversed unanimously by a panel consisting of Judges Jones, Brown and Wisdom. All three judges joined in Judge Brown's opinion that the Deputy Commissioner must hold a hearing at the carrier's request though the employee may not have filed a written demand for compensation under the Act. 274 F2d 794.

On May 27, 1960, however, a panel consisting of Judges Rives, Hutcheson and Jones affirmed the judgment of dismissal in the instant case in an opinion written by Judge Jones. Although he had joined in Judge Brown's opinion to the contrary in the companion case, Judge Jones, the only judge to sit on both panels, now stated that the difference between the cases lay in the fact that there was an allegation in the Atlantic & Gulf petition that employee's attorney had written a letter to the Deputy Commissioner and this could be interpreted as a written claim.[1]

On the same day, the Court of Appeals handed down a *per curiam* on a petition for rehearing in the *Atlantic & Gulf* case. The *per curiam* states that in its original opinion the court "held or intended to hold, that a letter

[1] Petitioner contends that the filing of a written claim is not material to the issue and to make it a requirement is an interpolation beyond the provisions of Section 14(h) and 19(c) of the Longshoremen's Act.

from the injured employee's lawyer to the Deputy Commissioner constituted a 'claim' for benefits under the Longshoremen's Act."

Judge Brown dissented, adhering to the scope of the original opinion.

The distinction made by the Court of Appeals indicates the schism in the different panels of the court rather than any substantial difference in the cases themselves and has led to an artificial interpretation of federal statutes which this Court should correct.

Argument

Since *Davis vs Department of Labor*, 317 US 249, announced the Twilight Zone Doctrine, employees injured over navigable waters have generally asserted the right to elect a remedy under the maritime law and Jones Act, the Longshoremen's Act, or a state compensation act. Rarely is an immediate election made or, if it is, the employee does not consider himself definitively bound by it.

The employer or carrier, on the other hand, must decide immediately following the injury, whether to pay the employee maintenance and cure, compensation under the Longshoremen's Act, or state compensation benefits.

The penumbra of the Twilight Zone is no less dense or financially perilous for the employer. If the Long-

shoremen's Act applies and payment has not been made under that act, the employer bears an exposure to penalties of 10%. Section 14(a) and (e), 33 USC 914(a) and (e). If the Louisiana Act is applied and the employer has failed to respond under that statute, it has an exposure of 12% penalties and sizable attorneys' fees. La. R.S. 22:658. Should the injured workman seek maintenance and cure benefits and the employer fail to anticipate this demand, the employer may be met with a claim for damages for his failure to pay maintenance and cure. See *Cortes vs Baltimore Insular Line*, 287 US 367, 370 (1932); *Sims vs War Shipping Administration*, 186 F2d 972 (CA 3-1951); 2 Norris, *The Law of Seamen* (1951), § 574.

Even if the employer pays the greatest weekly sum to which the employee would be entitled under any of the possible remedies, in the hope of avoiding penalties, the employer has no assurance that he will eventually get full credit and the difference between the amounts due and the amounts paid may constitute an irreparable loss.[2]

[2] For example, under Section 6(b) of the Longshoremen's Act (33 USC 906(b)), the maximum weekly payment is $54; the amount due weekly for maintenance and cure varies depending on the locale and hospitalization; under Section 1 of the Louisiana Compensation Act (RS 23:1202), the maximum weekly payment is $35. But an employer who voluntarily pays maximum compensation under the Longshoremen's Act, has no assurance that he will get full credit against his ultimate liability under the Louisiana act, because credit under the latter act is usually by weeks of benefits paid, not by dollar amount. *Carlino vs USF&G Co.*, 196 La. 400, 199 So 228 (1940); *Scalise vs Liberty Mutual Ins. Co.*, 84 So2d 88, 96, 98 (La. App.-1955).

Because the law providing the maximum weekly benefits may not yield the greatest monetary return in the last analysis,[3] it is not uncommon for an employee to demand and accept temporary payments of compensation under the act providing the greatest weekly return, and after he has exhausted this immediate remedy, turn to another form of recovery because it will give him the greatest residual claim. This is exactly what respondent Billodoux has done in this case.

Moreover, in each area of remedial action there are special issues and special definitions. Residual disability may be important under the Louisiana Act, whereas it has no significance where maintenance and cure are due.[4] Disability is defined differently in the Longshoremen's Act and the Louisiana Act.[5] The period of limitations for the assertion of the claims vary.[6] Responsibility for expenses is not the same.[7]

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[3] For example, the criteria for finding permanent total disability under the Longshoremen's and Louisiana acts differ materially. Hence, while scheduled recoveries for certain specific injury losses may give the employee more compensation under the Longshoremen's Act than under the Louisiana act, making out a case of permanent total disability is easier under the Louisiana Act. The recovery under the Jones Act, being unlimited, may be more attractive than either but yield less immediate return.

[4] Maintenance and cure claims are payable until optimum cure has been reached and no further improvement can be expected from additional treatment a concept which, by definition, excludes any element of "residual disability." *Farrell vs United States*, 336 US 511 (1949); *Gilmore and Black, The Law of Admiralty* (1957) 264.

[5] Compare, for example, 33 USC 902(10) and (21)(a) with Louisiana RS 23:1021(1).

[6] Compare 33 USC 913 with Louisiana RS 23:1209. Maintenance and cure claims are not subject to any statutory limitation period.

[7] Compare 33 USC 907 with Louisiana RS 23:1203.

Aside from the difference in the amount of weekly liability, the basic structure of the acts is dissimilar; and until the application of one of the three is determined, the correlative obligations and rights of the parties remain confused. This makes the early determination of the applicable remedy important to the employer, not only from the point of view of the actual amount of liability due but to aid him in directing a course of conduct which will comply with the spirit and letter of the applicable law.

The existing confusion and uncertainty contributes to a proliferation of claims, the extension of litigation,* and the prolongation of disability in the employee himself.

Of course, the employer is entitled, at the risk of penalty, to provoke a determination of the employee's remedy by refusing to pay anything and forcing litigation in every case. This would produce unnecessary litigation and violate the spirit of the employee-employer legislation which is designed to ease the employee's economic loss by encouraging early voluntary payment of compensation.

Equitably, it would be unfair and legally it would be improper to resolve the employer's dilemma by giving the employer the choice of the employee's remedy. On the other hand to grant the employer recourse to an

* Since Jones Act claims need not be filed for three years and the filing interrupts prescription under the Longshoremen's Act, claims are often nursed for years before final resolution.

early determination of his responsibilities is not unfair to either the employee or the employer or to anyone else concerned.

An early determination of the applicable remedy can be determined if the Deputy Commissioner will proceed under Section 14(h) and 19(c) of the Longshoremen's Act (33 USC 914(h) and 919(c)), coupled with Section 6(a) of the Administrative Procedure Act (5 USC 1005(a)).

As construed by the Court of Appeals in its original opinion in the companion case (cf. appendix at page 18 f.f. below), these statutory provisions (cf. appendix at page 12 f.f. below), require the Deputy Commissioner to hold a hearing, at the request of any interested party, to determine issues under the Longshoremen's Act in connection with any injury which is under his administration. This construction appears to be more in keeping with the scheme and purpose of the Act than the more artificial construction adopted by another panel of the same court in the case at bar.[9]

The interpretation given the Act in this instance requires interpolation,[10] a disregard of syntax[11] and leads

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[9] That the statutory mechanism was intended to operate without the filing of a written claim seems apparent from the stress laid on voluntary compliance. The employee must, within fourteen days after knowledge of injury, even when no written claim is filed, pay compensation benefits or controvert the employee's right thereto. Failure to do so exposes him to penalties, (33 USC 911(e), 944(g)); nor does the Deputy Commissioner depend on formal controversy for his authority to act, (33 USC 914(h) and 922).

[10] The word "written" has to be inserted in Section 19(c) of the Act before "claim" and the necessity of "filing" the claim has to be read in.

[11] The terminal phrase of Section 14(h) clearly modifies "further action", but the court treats it as if it qualifies everything proceeding it.

to an unworkable result.[5] This Court should grant certiorari to correct the erroneous construction of a federal statute.

The question presented is novel and of tremendous importance in matters falling within that broad area known as the Twilight Zone. An opportunity is offered to give stability to the chaotic situation which has arisen in the wake of the Twilight Zone Doctrine without calling for a relaxation or a modification of the essential equities of that doctrine.

It is respectfully submitted that this substantial and vexatious question should be settled authoritatively by this court and a writ should issue.

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July , 1960.

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[5] Will employers be put to the necessity of refusing to pay workmen their mucus-shed stipend to force the filing of a claim in writing?

APPENDIX

Statutes Involved

Section 14(b) of the Longshoremen's and Harbor Workers' Compensation Act; 33 U.S.C. § 914(b):

> "The Deputy Commissioner (1) may upon his own initiative at any time in a case in which payments are being made without an award, and (2) shall in any case where right to compensation is controverted, or where payments of compensation have been stopped or suspended, upon receipt of notice from any person entitled to compensation, or from the employer, that the right to compensation is controverted, or that payments of compensation have been stopped or suspended, make such investigations, cause such medical examinations to be made, or hold such hearings, and take such further action as he considers will properly protect the rights of all parties."

Section 19(c) of the Longshoremen's and Harbor Worker's Compensation Act; 33 USC. § 919(c):

> "The Deputy Commissioner shall make or cause to be made such investigations as he considers necessary in respect of the claim, and upon application of any interested party shall order a hearing thereon. If a hearing on such claim is ordered the Deputy Commissioner shall give the claimant and other interested parties at least ten days' notice of such hearing, served personally upon the claimant and other interested parties or sent to such claimant and

other interested parties by registered mail, and shall within twenty days after such hearing is had, by order, reject the claim or make an award in respect of the claim. If no hearing is ordered within twenty days after notice is given as provided in subdivision (b), of this section the Deputy Commissioner shall, by order reject the claim or make an award in respect of the claim."

Section 6(a) of the Administrative Procedure Act, 5 USC 1005(a):

"Every agency shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for the convenience and necessity of the parties or their representatives."

OPINION OF THE COURT OF APPEALS IN THIS CASE

JONES, Circuit Judge: The appellant, Employers Liability Assurance Corporation, Ltd., brought suit in the United States District Court for the Eastern District of Louisiana against P. J. Donovan, Deputy Commissioner of the Bureau of Employee's Compensation, United States Department of Labor, and against Louis Billodoux. By the complaint it was shown that Billodoux was an iron worker employed by Williams-McWilliams Industries, Inc., and on May 22, 1957, was engaged in the building of an oil drilling rig for Humble Oil and Refining Company on a drilling platform in

the outer continental shelf about nine miles from the Louisiana coast. On that day, while so employed, Billodoux sustained an arm injury. The appellant, as insurance carrier of Williams-McWilliams under the Longshoremen's and Harbor Workers' Compensation Act,[1] reported the accident to the Deputy Commissioner and commenced the payment of compensation benefits, which were continued for fifty-three weeks, and paid $1,218.10 of medical expense for Billodoux.

The complaint of the appellant alleged that Billodoux, after returning to work for about two weeks, left the employment of Williams-McWilliams on May 4, 1958. On May 12, 1958, he made a demand on the insurance company for payment under the Louisiana Workmen's Compensation Act.[2] On May 26, 1958, Billodoux brought suit in the Federal district court against Williams-McWilliams and Humble, founded on his May 22, 1957, injury, seeking relief under Section 33 of the Jones Act,[3] maintenance and cure and, in the alternative, the benefits of the Louisiana Workmen's Compensation Act. At the same time Billodoux brought another suit in the same court seeking recovery for the same injury as a maritime tort. The insurance company, so we learn from its complaint, requested the appellee Deputy Commissioner to hold a hearing to determine (1) "whether the Deputy Commissioner had jurisdiction of the claim", (2) if he has jurisdiction, whether further

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[1] 33 U.S.C.A. § 901 et. seq. References herein to the Act, unless qualified, shall refer to this statute.

[2] La. Rev. Stat. §§ 23:1021 et seq.

[3] 46 U.S.C.A. § 688

compensation is payable to Billodoux under the Longshoremen's and Harbor Workers' Act and (3) the amount, if any, due under the Act. The Deputy Commissioner refused to hold a hearing and so advised the insurance company.

The insurance company outlined at length, in its complaint, the difficulties which were presented by the multiple claims and suits, and the possibility of multiple liability for a single injury. The burden of defending these suits and claims could be eliminated and the exposure to excessive liability could be obviated, asserts the insurance company, if the Deputy Commissioner will hold a hearing and determine all or some one or more of the questions submitted to him in its request. The Deputy Commissioner and Billodoux each filed a motion to dismiss on the grounds that no claim was stated upon which relief could be granted and that the Court was without jurisdiction to grant the relief sought. The district court granted the motions to dismiss and entered judgment accordingly. The appeal presents its action for our review.

If we were bound by all that was said in the original opinion in *Atlantic & Gulf Stevedores, Inc. v. Donovan*, ...F. 2d ...., decided January 18, 1960, rehearing denied this day, we would reverse the judgment of the district court. But by a supplemental opinion of a majority of the Court the decision in that case was limited to the question presented by the facts upon which it was decided. The question here presented is

upon different and distinguishable facts and a different result is reached.

By Section 13(a) of the Act it is provided that the right to compensation for disability shall be barred unless "a claim therefor" is filed within a year after the injury, except that if payment of compensation has been made without an award the claim may be filed within a year after the date of the last payment. 33 U.S.C.A. § 913(a). By the succeeding Section 14, relating to payment of compensation, it is provided that,

> "The Deputy Commissioner (1) may upon his own initiative at any time in a case in which payments are being made without an award, and (2) shall in any case where right to compensation is controverted, or where payments of compensation have been stopped, or suspended, upon receipt of notice from any person entitled to compensation, or from the employer, that the right to compensation is controverted, or that payments of compensation have been stopped or suspended, make such investigations * * * or hold such hearings, and take such further action as he considers will properly protect the rights of all the parties." 33 U.S.C.A. § 914(h).

Section 19 of the Act deals with the procedure in respect of claims and there, in Section 19(c), it is enacted that,

> "The Deputy Commissioner shall make or cause to be made such investigations as he considers necessary in respect of the claim

> and upon application of any interested party he shall order a hearing thereon." 33 U.S.C.A. § 919(c).

An examination and comparison of Sections 914(h) and 919(c) discloses the difference between their provisions. Section 914(h), applicable where no claim has been filed, confers on the Deputy Commissioner a discretionary power to make such investigations or hold such hearings and take such further action as he considers will protect the rights of the parties. Section 919(c), applicable where a claim has been filed, contains a mandatory requirement that the Deputy Commissioner shall order a hearing upon a claim upon the application of any interested party.

A claim, within the meaning and contemplation of the Act, is something that is to be filed. Since it is to be filed it must be in writing. *Cf. Slade v. Branham*, D.C.Md. 1942, 47 F. Supp. 769. No particular form of claim need be used. The requirement of a claim is met if a writing, even though an informal one, of the injured employee or his attorney discloses an intention to assert a right to compensation. *Atlantic & Gulf Stevedores v. Donovan, supra; Fenney v. Willard*, D.C.S.D. N.Y. 1955, 129 F. Supp. 414. In *Atlantic & Gulf Stevedores v. Donovan, supra*, Section 919(c) was applicable since a claim was filed. In this case Section 914(h) is the pertinent section since no claim has been filed. If an insurer of liability under the Act, or any other interested party should have the right to require the Deputy Commissioner to hold a hearing where no claim

has been filed, the right must be given by Congress which has so far withheld such right. It is a right which the courts cannot confer.

The views that we hold make it unnecessary to state the often declared reluctance that the courts have in interfering with administrative processes and procedures. We do not need to consider the judicial power to coerce administrative officers who refuse or fail to perform a clearly defined duty or the power of the courts to correct abuses of the exercise of administrative discretion. Consideration of these questions is not required for our decision.

The judgment dismissing the action is

AFFIRMED.

ORIGINAL OPINION OF THE COURT OF APPEALS IN THE COMPANION CASE

BROWN, Circuit Judge: The question here is whether there is a legal means of requiring the Deputy Commissioner to proceed to decision in a matter properly before him under the Longshoremen's and Harbor Workers' Compensation Act. 33 USCA §901 et seq.

It is of vast importance as parties related to maritime injuries to a non-seafaring amphibious worker attempt to answer the riddle which *Jensen*[1] conjured up.

[1] Southern Pacific Co. v. Jensen, 1917, 244 U.S. 205, 61 L.Ed. 1086, 37 S.Ct. 524.

Self-help is unavailing for with the traditional prohibition in Workmen's Compensation Acts, both state and this federal one, against contractual waivers or releases there is no end to a potential claim until the last gong has rung in the last and highest tribunal which will listen. Guidance by experienced maritime counsel is uncertain. For his tools must be the jurisprudence which, to say the least, is more, not less, complex than it was in the pre-*Davis*[2] day, and all the more so since *Hahn*[3] as the changes of this Court in *Noah*[4] shortly on the heels of *Flowers*,[5] revealed. And while this Court has now firmly ruled that maritime injuries to one engaged in the classic occupation of a longshoreman loading or unloading a vessel,[6] and one engaged in repair of an existing vessel[7] are within the exclusive jurisdiction of the federal Act, not that of a state, the access of litigants to state tribunals makes ours an academic deliverance[8] until either the state courts concerned accept it as

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[2] Davis v. Dept. of Labor (Wash.), 1942, 317 U.S. 219, 87 L.Ed. 216, 63 S.Ct. 225, 1942 AMC 1653.

[3] Hahn v. Rosa Island Sand & Gravel Co., 1959, 358 U.S. 272, 79 S.Ct. 266, 3 L.Ed.2d 292, 1959 AMC 570, rehearing denied 359 U.S. 921, 79 S.Ct. 577, 3 L.Ed.2d 583, 1959 AMC 812.

[4] Noah v. Liberty Mutual Ins. Co., 5 Cir., 1959, 265 F.2d 517, 1959 AMC 573, overruled on rehearing en banc 267 F.2d 218, 1959 AMC 2017.

[5] Flowers v. Travelers Ins. Co., 5 Cir., 1958, 258 F.2d 220, 1958 AMC 2420.

[6] Noah v. Liberty Mutual Ins. Co., note 4, supra.

[7] Flowers v. Travelers Ins. Co., note 5, supra.

[8] Pending before another panel of this Court is another case, No. 17959, T. Smith & Son, Inc. v. Williams, which presents the question whether, in view of the anti-state court injunction prohibition of 28 USCA §2283, a United States District Court may enjoin prosecution of a claim under the Louisiana Workmen's Compensation Act in a Louisiana Court of the very kind of claim which we held in *Noah*, note 4, supra, was exclusively under the Longshoremen's Act. Obviously this opinion does not undertake to decide that question or influence it in any way.

authoritative or their contrary decisions are upset by the possibility of certiorari from the United States Supreme Court.

So it is here. After voluntary payment of substantial compensation under the Longshoremen's Act, the Employer now finds himself faced with a claim under the Louisiana Workmen's Compensation Act in the state court while the case file yet remains open—at least not closed—before the Deputy Commissioner. The Employer did not seek coercive injunctive relief against either the Claimant or the state court. Rather it sought (a) a declaration under 28 §§2201, 2202, that the Longshoremen's Act was the Claimant's exclusive remedy and, alternatively, (b) a mandatory order directing the Deputy Commissioner to "proceed with a hearing to determine * * * the * * * issues raised" by the Employer's application before the Deputy Commissioner.

The District Court sustained the Deputy Commissioner's motion to dismiss for "failure to state a claim on

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See, for example, the state cases which have arrived at conclusions contrary to *Flowers* and *Noah*, but on which certiorari has been denied. See, e.g., Richard v. Lake Charles Stevedores, Inc., La.App., 1957, 95 So.2d 830, cert. denied 355 U.S. 952, 78 S.Ct. 535, 2 L.Ed.2d 529; Sullivan v. Travelers Ins. Co., La.App., 1957, 95 So.2d 834, cert. denied 355 U.S. 952, 78 S.Ct. 535, 2 L.Ed.2d 529; see also Indemnity Ins. Co. v. Marshall, Tex.Civ.App., 1957, 308 S.W.2d 174, writ ref. n.r.e. in which certiorari was not sought. Of course, the explanation, conceptually unsatisfactory as it is, is that denial of certiorari is of no significance. Brown v. Allen, 1953, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469; Atlantic Coast Line R. Co. v. Powe, 1931, 283 U.S. 401, 51 S.Ct. 498, 75 L.Ed. 1142. But this does not eliminate the possibility that certiorari may be denied leaving amphibious workers in the same state under one act rather than the other depending on many uncontrollable contingencies.

which relief can be granted and the lack of jurisdiction for this court to hear and determine the issues presented prior to administrative action taken by the Deputy Commissioner upon a claim first filed for that purpose." Consequently, we accept as true the facts set forth in the complaint.[3] Their summary we take, with but slight change or paraphase, from the Employer's brief.

Charles Cook, the Claimant, injured his right leg on February 18, 1957 while employed by Employer as a longshoreman. He was landing a pallet board on No. 3 deck aboard the S S Haria Rosa docked in the Mississippi River at the Congress Street Wharf, New Orleans.

The accident was reported to the Deputy Commissioner's office on February 22, 1957 and Employer continued to make reports to that office. Compensation payments of $18 a week were started immediately, but on May 16, 1957 Cook's attorney notified the Deputy Commissioner that Cook's claim was for $26.61 a week under the Longshoremen's Act and he submitted statements to support the claim. Acting on this information, the Deputy Commissioner found that the weekly compensation payments should be $26.60 and so informed Employer. Employer complied with the ruling and ad-

[3] The Court subsequently called for production of the Deputy Commissioner's file. Just what treatment was accorded this is not revealed. That record has been lodged here as an original exhibit. Neither party urges that this record in any respect detracts from the factual statements alleged in the complaint, or that, if treated as a motion for summary judgment under F.R.Civ.P. 12(c), it presents matters on which there is no genuine dispute as to a material fact compelling a judgment of dismissal for other reasons.

justed payments so that Cook received eleven weeks' compensation from May 8, 1957 through July 27, 1957, or $292.71. Payments terminated July 27, 1957 when Cook was given medical clearance and returned to work.

Almost a year later Cook, through his attorney, wrote the Deputy Commissioner to make claim for further compensation for his February 18, 1957 injury. But before any action was taken on this request, he filed a suit for Louisiana Workmen's Compensation benefits, plus 12% penalties and attorneys' fees, in the Civil District Court for the Parish of Orleans.

The Employer thereafter formally requested the Deputy Commissioner to fix a hearing to determine: (i) if the Deputy Commissioner had jurisdiction of the claim; (ii) if Cook's claim under the Longshoremen's Act had prescribed; and (iii) if the Deputy Commissioner had jurisdiction, and the claim had not prescribed, whether Cook was entitled to further compensation benefits under the Longshoremen's Act, and the amount, if any, due under that Act. The Employer's request for a hearing was refused.

In seeking to justify this dismissal, the Deputy Commissioner devotes nearly of his energy (sic) to combating that part of the relief requested in the complaint summarized above as (a) a declaration by the Court under 22 USCA §§2201, 2202, that the Longshoremen's Act was claimant's exclusive remedy. But this is no longer in the case. The Employer does not undertake now to have us

review either the power of the District Court to grant declaratory relief or the propriety of its exercise.[11]

All that is now involved is the power of the District Court to issue a mandatory decree compelling the Deputy Commissioner to proceed with the hearing—a hearing in which the Deputy Commissioner would arrive at his own decision, and which, under the Longshoremen's Act, 33 USCA §921, would then, and only then, be subject to judicial review. This is a command to hear and adjudicate. Not a command to tell him *how* it is to be decided.

The Deputy Commissioner's position is difficult to understand. By statute, see note 22, *infra*, he is charged with the responsibility of deciding all matters relating to compensation payable to persons sustaining specified maritime injuries. The Act by its terms prescribes that it shall be the exclusive remedy, 33 USCA §905, with respect to "an injury occurring upon the navigable waters of the United States * * * if recovery for the disability * * * through workmen's compensation proceedings may not validly be provided by State law." 33 USCA §903(a).

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[11] Little if anything was given up by this concession. Declaratory relief cannot be used to review or anticipate action of an administrative agency as to which a review procedure, as is the case under 33 USCA §921, is established. Leonard v. Liberty Mutual Ins. Co., 3 Cir., 1959, 267 F.2d 421; London Guarantee & Accident Co., Ltd. v. Rhoades, W.D.La., 1941, 39 F.Supp. 589; Paramino Lumber Co. v. Marshall, 9 Cir., 1958, 95 F.2d 203; A. L. Burbank Co. v. Willard, 1950, 93 F.Supp. 891; see Public Service Comm. (Utah) v. Wycoff Co., 344 U.S. 237, 97 L.Ed. 291, 73 S.Ct. 236; Myers v. Bethlehem Shipbuilding Corp., 1938, 303 U.S. 41, 82 L.Ed. 638; Fouts v. United States, 5 Cir., 1933, 67 F.2d 219.

Whatever may be the position of claimants who are so far free to try to get a state court to allow recovery under state compensation acts, the Deputy Commissioner is patently subject to the authoritative declarations of the Federal Courts, and certainly this one, as to a Deputy Commissioner who functions within the geographical confines of this Circuit. So bound, it must have been clear that on the facts asserted, this was an alleged injury sustained by a person while engaged in performance of his duties as a longshoreman in the handling of cargo on a vessel in the Mississippi River. As such, it was, if the evidence bore out the allegations, one exclusively under the Longshoremen's Act, as we had by that time so plainly held in *Noah*.[12]

The Deputy Commissioner does not really challenge this. Nor does he contend that the claim was not under the Longshoremen's Act. Rather, his position is that he is *required*, i.e., compelled, by the statute to hold a hearing only when a claim, as such, has been filed. Since compensation was here paid without the filing of a formal claim and none has ever yet been filed, he is not required to hold a hearing. As the Act does not require a hearing under this situation, the Court cannot compel him to do so. At most, the argument goes, a Court may compel only that which the statute orders. And that is lacking here.

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[12] This is not a left-handed direction on *how* the case is to be decided by the Deputy Commissioner, see note 11, supra and related text. We expressly refrain from any intimation. The situation is comparable to an ordinary complaint *apparently* within a court's jurisdiction which the court must hear to determine whether on the facts and law it really is within its jurisdiction.

It is at this point that the dispute narrows. For the Employer finds explicit direction to the Deputy Commissioner to hold hearings when requested by an interested party on all material questions arising in connection with liability for compensation payments or other benefits under the Act. This it finds in §§914(h)[13] and 919(c).[14] But to them, the Deputy Commissioner insists that by their use of the word "claim" each section has in mind the written, signed formal claim on the usual prescribed official form which was not filed in this case.

A consideration of the whole Act and the automatic "almost self-executing"[15] nature of it is convincing that this is to read the Act and the Deputy Commissioner's responsibilities in much too technical a way. In contrast to many compensation acts which require a formal claim at the outset, what sets the whole thing in motion under the Longshoremen's Act is the accidental maritime injury. The employer must keep a record and make a re-

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[13] 33 USCA 914(h)

"The Deputy Commissioner (1) may upon his own initiative at any time in a case in which payments are being made without an award, and (2) shall in any case where right to compensation is controverted, or where payments of compensation have been stopped or suspended, upon receipt of notice from any person entitled to compensation, or from the employer, that the right to compensation is controverted, or that payments of compensation have been stopped or suspended, make such investigations * * * or hold such hearings, and take such further action as he considers will properly protect the rights of all the parties."

[14] 33 USCA 919(c).

"The Deputy Commissioner shall make or cause to be made such investigations as he considers necessary in respect of the claim, and upon application of any interested party he shall order a hearing thereon."

[15] This is spelled out in *Flowers*, note 5, supra, especially at notes 11 and 16 and related text.

port within ten days after it has knowledge of a maritime injury. Failure to do so subjects it to liability for $500 civil penalty and tolls the administrative one-year limitation period under §913(a) until the notice is filed.[16]

The momentum, though, is more than mere paper reports. Knowledge of the maritime injury by the employer and the coincidence of resulting disability to the employee sets in train important substantive obligations *unless* the employer takes affirmative action to controvert liability. Thus, he must, without a preliminary coercive order, "furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine * * * for such period as the nature of the injury or the process of recovery may require."[17] Perhaps even more important the Act provides that "except where liability to pay compensation is controverted by the employer," this knowledge of the maritime injury and the coincidence of resulting disability for the requisite time[18] automatically requires that "compensation * * * shall be paid periodically, promptly, and directly to the person entitled thereto, without an award."[19] Payment must be made within 14 days "after the employer has knowledge of the injury * * *."[20]

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[16] 33 USCA §930(a), (e) & (f).

[17] 33 USCA §907(a). See Eikel v. Voris, D.C.Tex., 1951, 101 F.Supp. 963, affirmed 5 Cir., 1952, 200 F.2d 724, reversed on other grounds, 1953, 346 U.S. 328, 74 S.Ct. 88, 98 L.Ed. 5.

[18] Compensation is not allowed for the first three days of disability unless disability persists more than 28 days in which case compensation is payable from the date of disability. 33 USCA §906(a). Compensation benefits are payable during the continuance of disability, permanent, temporary, total or partial as prescribed in 33 USCA §908(a)-(c).

[19] 33 USCA §914(a).

[20] 33 USCA §914(b).

and a failure to begin payment or make subsequent installment payments within a like period of 14 days subjects the employer to a penalty of 10%.

While the payment of compensation and furnishing medical benefits may be, and generally is, on such a self-executing automatic basis without preliminary coercive legal orders, it does not mean that such actions are over and beyond the Act or that the Deputy Commissioner has no responsibilities during that period. Quite to the contrary, it works that way because the Act prescribes that way. And the Deputy Commissioner, charged generally with administration of such cases,[7] has many continuing responsibilities and duties in which he functions as the impartial administrator.[8]

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[6] 33 USCA §914(e). The 10% penalty is to be "paid at the same time but in addition to such installment." It is payable unless excused by the Deputy Commissioner after showing that failure to pay timely was "owing to conditions over which [the employer] had no control."

[7] See 33 USCA §929(b), 919(d), 927.

[8] In contrast to a court, the Deputy Commissioner does not sit like a judge waiting for the parties to make a move. The Act imposes upon him the duty of making such investigations as he considers necessary. 33 USCA §930(a), 923(a). In the routine handling of cases, he has many decisions to make, e.g., the need for and appointment of an impartial physician to determine disability, 33 USCA §907(b), the time at which temporary total disability ceases, 33 USCA §908(b), the extent, nature or percentage of permanent partial disability, 33 USCA §908(c), ascertainment of difference in wage-earning capacity, 33 USCA §908(h), determination of applicable average weekly wage for purpose of computing compensation benefits, 33 USCA §910 and the like.

That the success of the operation of the Act rests principally upon the continuous informal administration of cases by the Deputy Commissioners rather than the few isolated formal hearings after claim and controversion is reflected by the Annual Reports of the Department of Labor which the Act, 33 USCA §943, requires the Secretary to make to Congress.

That is of extreme importance for if the Deputy Commissioner has continuing responsibilities during the period a case is being processed on this self-executing basis, it must be recognized that he functions as an im-

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The Annual Report, Department of Labor 1957, p. 70, describes the operation under the Longshoremen's Act: "Under the law, the first payment of compensation must be made within 14 days after the employer has knowledge of the injury or death. Known as the direct payment method, the record of timeliness of payment has been singularly good on the part of the majority of private insurance companies and self-insurers. Formal hearings and court proceedings are the exception. Because of the large number of injury cases involved, however, the amount of administrative work necessarily involved in the district offices is impressive. During 1957 there were 33,981 personal interviews with claimants and employers or their representatives, 11,848 informal conferences relating to claims, 8,027 independent medical examinations ordered, and 342 formal hearings completed." The 1958 Report indicates that "although such administrative activity in 1958 remained relatively the same as in the previous year, the number of informal conferences on claims increased * * *." Annual Report, Department of Labor 1958 p. 74.

The 1958 Annual Report at pages 74-75 demonstrates that large numbers of employees are involved and that fulfillment of its purpose demands routine, regular, certain, informal administration:

"It is believed that close to 350,000 longshoremen, shiprepairmen, and other maritime workers are affected. * * *

For 1958 there were 71,076 injury death cases reported. During the same period 74,954 cases were closed with compensation benefits (excluding medical) totaling $8,903,192. At the year end 18,968 cases were still active. The annual average for 1947-1949 is even more imposing: 114,296 reported injuries, 116,857 cases disposed of, 11,293 remaining active.

This is in contrast to the few cases disposed of by formal hearings: 342 in 1957 and for 1958 only 371 under Longshoremen's as well as District of Columbia, Defense Bases and Outer Continental Shelf Lands Act coverages. This is achieved by informal continuous administration as the 1958 Report emphasizes. "During 1958, there were 34,061 personal interviews with claimants and employers or their representatives, 13,764 informal conferences relating to claims, 6,938 independent medical examinations ordered, and 371 formal hearings completed. Although such administrative activity in 1958 remained relatively the same as in the previous year, the number of informal conferences on claims increased 16 percent." 1958 Report at p. 74.

partial administrator bound to accord to the employer no less than to the employee all the rights and protection that the Act prescribes. In other words, his duty to determine relevant matter extends to both parties, not just one. During all of this time the employer is no less an interested party than he is when a formal claim has been filed. Just as the Deputy Commissioner has during this interim the obligation to ascertain relevant fact-legal questions having importance to the employee, so must he determine the merits of those significant to the employer.

This analysis demonstrates that neither the responsibilities of the Deputy Commissioner nor the right of either one or both of the parties to call on him to determine relevant matters committed to him by the Act, can depend on a formal claim having been filed: If that were so, the Act would be one-sided, the employer would have no means of exerting his statutory right to have the Deputy Commissioner pass on his contentions, and would be left to the uncontrollable contingency of the claimant filing or not filing a claim. The only alternative would be for the employer to file, within the 14 days after notice of the injury, a formal controversion[24] in every case. Any such practice would effectually destroy the statutory goal that "compensation * * * shall be paid periodically, promptly, and directly * * *, without an award."[25]

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[24] 33 USCA §914(d) provides: "If the employer controverts the right to compensation he shall file with the deputy commissioner on or before the fourteenth day after he has knowledge of the alleged injury * * * a notice * * * stating that the right to compensation is controverted * * * and the grounds upon which the right to compensation is controverted."

[25] 33 USCA §914(a). See also note 23, supra.

Consequently, the word "claim" as found in §919(c), note 14, *supra*, or 914(h), note 13, *supra*, is not to be read in the technical sense of a formal claim signed by the claimant. It refers generally to the case involving that particular injured employee against that employer for the specified accidental injury. Construed in this fashion to achieve a balanced judicial adjudication of adversary rights, both sections affirm that the Deputy Commissioner has the duty "upon the application of any interested party" to "order a hearing thereon."[28] Of course, the Act does not undertake to prescribe the form or content of the hearing. A reasoned flexibility and an adaptation to the requirements of a particular situation is recognized by the language of §914(h), note 13, *supra*, that the Deputy Commissioner shall "* * * hold such hearings, and take such further action as he considers will properly protect the rights of all the parties."

Again, without anticipating the kind of hearing which must be held, or the decision to be made from it, it is clear that the facts alleged in the complaint showed that the Employer was asserting a valuable right which §914(h) says the Deputy Commissioner must "properly protect." That "right" is the Employer's right to have his liability determined under the Longshoremen's Act if it in law is the applicable one. For the Longshoremen's Act is not a one-way street. It imposes severe liabilities on an employer. At the same time, it accords to him substantial protection. For a case within the Act, the em-

[28] 33 USCA §919(3).

ployer is assured that under no other law, in no other forum, will he finally be compelled to pay money to the employee. The liability of the employer for compensation under the Longshoremen's Act "* * * shall be exclusive * * * of all other liabilities of such employer to the employee * * * and anyone otherwise entitled to recover damages from such employer * * * on account of such injury * * *."[22]

That right is as valuable at the end of the case as it is either in the beginning or some place down the line. Indeed, where the employer contends that his obligations under the Longshoremen's Act have been fulfilled, he is, if that contention is borne out by the facts, entitled to an adjudication by the Deputy Commissioner, in order to make effective the bar which the exclusive liability of §905 raises. There is, then, nothing inconsistent with the employer demanding a hearing whose object is to establish judicially that the Longshoremen's Act applies, but that on the merits[23] no further compensation is due.

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[22] 33 USCA §905.

[23] This might, as here, include the question of the timeliness of the claim. A formal claim, as we have explained, is not essential to impose liability for compensation where no controversion is filed by the employer. §913(a) does provide, however, that "if payment of compensation has been made without an award * * * a claim may be filed within one year after the date of the last payment." The limitation may also be waived, §913(b), or tolled, §930(f). We may assume, without deciding, that upon the hearing the employer can present what is effectually a controversion even though filed long after the 14 days subsequent to the injury as prescribed in §914(d), note 24, supra. See Leonard v. Liberty Mutual Ins. Co., 3 Cir., 1959, 267 F.2d 421, 425; Simmons v. Marshall, 9 Cir., 1938, 94 F.2d 850. And we would point out, again without deciding, that the provision for suspending further voluntary payments made without a formal award, §914(e), making the time for filing claim for further

Quite to the contrary, after payment of substantial compensation and the furnishing of medical benefits unlimited in duration and cost, the most valuable right would be a determination that all obligations to the employee have been fulfilled.

Since, as we have held, the Longshoremen's Act imposes the duty on the Deputy Commissioner to hold a suitable hearing to pass upon and adjudicate the contentions now made by the Employer and properly before him for decision, little need be said of the District Court's power to compel him to proceed.

If it is not inherent in the Longshoremen's Act itself, it certainly is in the Administrative Procedure Act which, as we and others have held, controls proceedings under the Longshoremen's Act.[29] The APA provides categorically that "every agency shall proceed with reasonable dispatch to conclude any matter presented to it * * *."[30] Apparently in recognition that a failure or refusal to hear and decide could be as de-

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compensation date from the time of the last of such payments, §913(a), and the requirement of §914(h), note 13, supra, that where payments have been stopped the Deputy Commissioner shall take steps to investigate and hold hearings, seem to reflect that prior automatic voluntary payments do not preclude the employer from thereafter denying liability for further benefits.

[29] Southern Stevedoring Co. v. Voris, 1951, 5 Cir., 190 F.2d 275; O'Leary v. Brown-Pacific-Maxon, 1951, 340 U.S. 504, 71 S.Ct. 470, 95 L.Ed. 483; United States Fidelity & Guaranty v. Donovan, D.C.Cir., 1954, 221 F.2d 515; Colonna's Shipyard, Inc. v. O'Hearne, 4 Cir., 1952, 200 F.2d 220; Richardson v. Britton, D.C.Cir., 1951, 192 F.2d 423; Dunn v. Belair, D.C.R.I. 1955, 134 F.Supp. 802; Plass v. O'Hearne, D.C.Md., 1954, 124 F.Supp. 215.

[30] 5 USCA §1005(a).

structive as bad deciding.[31] Congress provided in §10(e) that Courts may review the inaction of an agency and specifically "compel agency action unlawfully withheld or unreasonably delayed."[32] And enforcement may be by a mandatory injunction.[33]

The Deputy Commissioner, on the facts set forth in the complaint, has failed and refused to hold any hearing or determine the contentions made by the Employer. This is in derogation of his statutory duty, and if the facts are established the District Court was empowered to issue suitable orders to "compel agency action unlawfully withheld," 5 USCA §1009(e)(A), note 32, *supra*. It was error to dismiss the complaint and the matter must be reversed and remanded for further consistent action.

REVERSED AND REMANDED.

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[31] The valuable volume, Senate Document No. 248, 79 Cong., 2d Sess., 1946. "Legislative History of the Administrative Procedure Act" at page 264 points out that §6(a) of the APA, 5 USCA §1005(a), note 30, supra, was enacted to make certain that "no agency shall, in effect, deny relief or fail to conclude a case by mere inaction, or proceed in dilatory fashion to the injury of the persons concerned."

[32] 5 USCA §1009(e)(A)

To meet the criticism that §10(e) of the APA, 5 USCA §1009(e), would unduly extend the scope of review by authorizing courts to specify administrative action to be taken, Congress used language to make clear that "the provision means that the court may compel the agency to act where it has 'unlawfully withheld' action rather than to direct action and state what it will be in detail. The court may require agencies to act, but may not under this provision tell them how to act in matters of administrative discretion." Sen. Doc. No. 248, note 31 supra, at 40.

[33] "The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction." 5 USCA §1009(b).

PER CURIAM OPINION OF THE COURT OF APPEALS ON PETITION FOR REHEARING IN THE COMPANION CASE

PER CURIAM: The appellee, by Petition for Rehearing, urges a reconsideration of the proposition that "although no claim has been filed with the Deputy Commissioner, the District Court may nevertheless issue a mandatory decree compelling the Deputy Commission 'to hear and adjudicate.'" In our opinion it was recited that the claimant, through his attorney, wrote the Deputy Commissioner to make further claim for compensation. We held, or intended to hold, that the letter from the claimant's attorney was a "claim" within the meaning of Section 19(c) of the Longshoremen's and Harbor Workers' Compensation Act,[1] although not on the form prescribed by the Department of Labor. Since a claim was filed the insurance carrier of the employer and an "interested party" under Section 19 (c), had the right to apply for a hearing, and upon such application being made the Deputy Commissioner was under a duty to order a hearing upon the claim in the regular course of the administration of his office.

In the opinion we indicated that the Deputy Commissioner might be under a duty to conduct a hearing under Section 14(h) of the Act[2] upon application of an interested party and that such duty might be enforced by a mandatory injunction. A majority now concludes that any opinion with respect to this question should be reserved for a case where it is properly presented by

[1] 33 U.S.C.A. § 19(c)
[2] 33 U.S.C.A. § 914(h)

the facts. Such question is not presented by the facts of this case and we now intend that no opinion shall be expressed as to how such question should be decided.

We adhere to our former holding in that, under Section 19(c), the Deputy Commissioner was under a duty to order a hearing. It follows that the decision was correct and the petition for rehearing is

DENIED.

BROWN, Circuit Judge, dissenting:

I concur in the denial of the petition for rehearing. But I respectfully dissent in the holding that the Deputy Commissioner's duty to proceed with a hearing on the Employer's application came into being because the letter from the Claimant's lawyer constituted a "claim." This difference comprehends also the reservation—for another case and another day—of the question whether the Deputy Commissioner has the duty to proceed to a hearing where no written "claim" has been filed. The reservation—if not a retraction—leaves the Court free in subsequent cases to reach a decision contrary to that previously announced and which, for the reasons extensively set out in the Court's original opinion, 274 F.2d 794, I firmly feel was correct. Under the Longshoremen's Act a written claim—whether on the official form or by a letter or other writing—is of little significance. It certainly is not the source or

measure of the Deputy Commissioner's duty to administer.

I must therefore dissent.

JUDGMENT OF THE COURT OF APPEALS IN THIS CASE.

JUDGMENT

Extract from the Minutes of May 27, 1960

THE EMPLOYERS LIABILITY ASSURANCE CORPORATION, LTD.,

No. 18088. versus

P. J. DONOVAN, Deputy Commissioner of the 7th Compensation District of the Bureau of Employee's Compensation, U. S. Department of Labor & LOUIS BILLODOUX.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.